IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELAINE KAPSIMALIS, an unmarried woman, The Estate of ELAINE KAPSIMALIS, Debtor/Plaintiff-Appellant, v. GREAT WESTERN BANK, a Federal Savings Bank, Defendant-Appellee.	1 CA-CV 94-0452A DEPARTMENT D DECISION ORDER (Not for Publication - Rule 29, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Maricopa County
Cause No. CV 94-90943 and CV 94-09396 (Consolidated)
The Honorable Michael McVey, Judge
REVERSED

Dominguez & Talamante
By: David M. Talamante and Julia Salazar
Attorneys for Appellant — Phoenix

Kempton, Jarvis, Decker, Jenkins & Walker, P.A.
By: Roger R. Foote
Attorneys for Appellee — Mesa

LANKFORD, Judge

This appeal, accelerated under Rule 29, Ariz.R.Civ.App.P., was heard by the Court, Presiding Judge William F. Garbarino and Judges Jefferson L. Lankford and James B. Sult participating.

The underlying case consists of two consolidated actions: a forcible entry and detainer by Great Western Bank against Kapsimalis, and a quiet title action by Kapsimalis against the Bank. The trial court entered summary judgment against Kapsimalis on both claims. We reverse.

The dispositive question is the validity of the trustee sale conducted by the Bank. It is this sale that determines the rights to title and possession at issue in the forcible entry and quiet title claims. We hold that the sale was void.

The Bank originally noticed the trustee's sale prior to the filing of a bankruptcy petition by Kapsimalis in 1991. The Bank obtained relief from the automatic stay, but did not conduct the sale until 1994. In the interim, an event crucial to the outcome of the appeal occurred: the bankruptcy court confirmed Kapsimalis' reorganization plan.

The plan provided for two obligations to the Bank based on the debt secured by the deed of trust. The first obligation was to pay monthly payments of principal, interest and arrearages. The plan provided that if Kapsimalis defaulted on this obligation, the Bank was "entitled without further notice to conduct the Trustee's Sale it has scheduled and has been continuing from time to time. . . ." The second obligation was to pay "the balance of the arrearages owed by Debtor to [Great Western] . . . by April 1, 1994. . . ."

Kapsimalis made the monthly payments prior to April 1994 but failed to make the lump sum arrearages payment on April 1. The Bank deemed that to be a default and, without further formal notice to Kapsimalis, held the trustee's sale.

The defect in the sale was that it was conducted without notice. Arizona law requires formal notice for a valid sale. Ariz.Rev.Stat.Ann. ("A.R.S.") §§ 33-808, 33-809.

The bankruptcy plan of reorganization -- which controls the relationship between debtor and creditor, 11 U.S.C. § 1141(a) -- did not provide otherwise. The confirmed plan contains no provision that if the debtor defaulted on the lump sum arrearages payment, the Bank could hold the sale without further notice. This provision is in marked contrast to the monthly payment provision, which did allow the Bank to proceed without notice. These are two separate provisions, and nothing in the plan or in any order of the bankruptcy court indicated an intent that the no-notice provision regarding the monthly payment obligation also applied to the lump sum arrearages obligation.

The trustee's sale cannot be validated as a "continuation" of the sale notice prior to the filing of the bankruptcy. Such a continuation sale would not require additional, formal written notice to the debtor. *See* A.R.S. § 33-810(B). The sale is not a continuation because the first notice of sale rested on a pre-bankruptcy default on a pre-bankruptcy debt. This debt and default were erased by the confirmation of a reorganization plan. The bankruptcy statute clearly provides that "the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . ." 11 U.S.C. § 1141 (d)(1)(A). After the plan is confirmed, the debtor's obligations are defined solely by the plan. Thus, only a default on a debt under the plan can constitute a default after the plan is confirmed. That is a new

default on a new obligation, and thus the creditor cannot rely on a continuation of a pre-bankruptcy sale on a pre-bankruptcy default to evade the statutory notice requirement.

This reasoning is followed in a recent bankruptcy case not cited to us by the parties, *In Re Peters,* 184 B.R. 799 (9th Cir. BAP 1995). Although *Peters* was a chapter 13 case and not a chapter 11, the relevant statutory provisions are similar. Nor do we find a meaningful difference in the fact that in *Peters,* the automatic stay was in effect. The court's reasoning applies whether or not a stay was issued because the question determined is the procedure for a post-confirmation trustee's sale.

In brief, *Peters* held that the only way a creditor could hold a continued foreclosure sale would be to rest it on the pre-petition default. However, the confirmation plan erased that default. The sale could therefore be based only on a post-confirmation default, which requires that the creditor renotice the default under state law.

Because the sale was void, the trial court's judgment in favor of the Bank was erroneous. We reverse the judgment and remand to the trial court for the entry of judgment in favor of Kapsimalis on both claims, without expressing any opinion on the recoverability of attorney's fees or any other specific relief she seeks.

As to attorney's fees on appeal, Kapsimalis failed to make a proper request, citing only Rule 21(c), Ariz.R.Civ.App.P., which is a procedural rule governing the timing and form of fee requests. She did not cite any statute or other substantive authority for recovery of her fees incurred on appeal.

Accordingly, we reverse the trial court's judgment, deny the request for fees on appeal, and remand for further proceedings consistent with this decision.

DATED this 21st day of December, 1995.

Jefferson L. Lankford, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

MINUTE ENTRY

The Honorable Michael R. McVey **August 1, 1994**

No. CV 94-90943 - Consolidated

Great Western Bank Roger R. Foote

v.

Elaine Kapsimalis David Talamante

The court has considered plaintiff Great Western Bank's (GWB) motion for summary judgment, the defendant's response to motion for summary judgment/reply to motion to consolidate/motion to dismiss, as well as the arguments raised in defendant's June 20, 1994 motion to consolidate/motion to dismiss. The court has considered all of the statements of fact and exhibits submitted in support thereof, as well as the oral arguments of the parties.

THE COURT FINDS that there are no genuine issues of material fact and that plaintiff GWB is entitled to judgment as a matter of law. Therefore,

IT IS ORDERED granting summary judgment in favor of plaintiff and against defendant on plaintiff's forcible detainer action. Defendant shall vacate the subject premises on or before August 21, 1994.

IT IS FURTHER ORDERED awarding plaintiff an award of damages representing the fair market rental value of the property from May 1, 1994 until the date plaintiff vacates the property, said amount to be determined by the court.

IT IS FURTHER ORDERED that plaintiff shall remove the lis pendens on the subject property on or before August 21, 1994.

IT IS FURTHER ORDERED awarding plaintiff its cost of suit, and a reasonable amount as and for attorneys' fees, all in an amount to be determined by the court.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

In re: GREAT WESTERN BANK, a Federal Savings Bank, Plaintiff, v. ELAINE KAPSIMALIS, an unmarried woman; JOHN DOE OCCUPANTS 1-5; JANE DOE OCCUPANTS 1-5; ABC CORPORATIONS; and XYZ PARTNERSHIPS, Defendant.	Case No. CV 94-90943 Case No. CV 94-09396 (Consolidated) JUDGMENT (Assigned to the Honorable Michael McVey)
ELAINE KAPSIMALIS, an unmarried woman, Plaintiff, vs. GREAT WESTERN BANK, a Federal Savings Bank; JOHN DOES and JANE DOES 1-10; ABC CORPORATIONS 1-10; and XYZ PARTNERSHIPS 1-10, Defendants.	

THIS CAUSE, having been heard by the Court on Motions for Summary Judgment on August 1, 1994, Plaintiff/Defendant Great Western Bank appearing by its attorneys, KEMPTON, JARVIS, DECKER, JENKINS & WALKER, P.A., and Defendant/Plaintiff ELAINE KAPSIMALIS appearing through her counsel, ORTEGA, MORENO & TALAMANTE, and the Court finding Great Western Bank is entitled to judgment as a matter of law, the parties stipulating to the fair rental value of the property, the Court expressly determining that there is no just reason for delay in entering final judgment, hereby expressly directs, pursuant to ***Rule 54(b)***, Rules of Civil Procedure, that final judgment be entered in favor of Plaintiff's claim for relief.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant ELAINE KAPSIMALIS, is guilty of the charge of forcible detainer and is liable to Plaintiff for rent and other charges from May 1, 1994, through August 21, 1994, in the amount of Five Thousand Six Hundred Fifty and 00/100 Dollars ($5,650.00), with rent to continue to accrue at the rate of $50.00 per day, until Defendant vacates the property, attorneys' fees in the amount of $3,732.06, and Court costs in the sum of $209.25, with interest on the total judgment at the rate of 10% per annum from the date of judgment, until paid.

IT IS FURTHER ORDERED that said Defendants right to possession of the premises, and those holding possession through her, are terminated and Plaintiff is awarded immediate possession of the premises located at 10191 East Jenan Drive, Scottsdale, Arizona 85260.

IT IF FURTHER ORDERED that said Defendant shall immediately surrender possession of the premises and all fixtures and appurtenances thereon to Plaintiff. If possession is not surrendered to Plaintiff on or before 5:00 p.m. August 21, 1994, the Clerk of the Court shall issue a Writ of Restitution to the Sheriff of Maricopa County, Arizona commanding him to

restore possession of the premises to Plaintiff from Defendant, or anyone holding possession under Defendant or otherwise.

IT IF FURTHER ORDERED quieting title in favor of Great Western Bank and their successors-in-interest.

IT IS FURTHER ORDERED that this action is dismissed as to John Doe Occupants 1 through 5, inclusive; Jane Doe Occupants 1 through 5, inclusive, ABC Corporations and XYZ Partnerships, inclusive.

IT IS FURTHER ORDERED awarding Great Western Bank its attorneys' fees in the sum of $3,732.06 and costs in the sum of $209.25, with interest on the fees, costs and rent at the rate of ten percent (10%) per annum from the date of judgment, until paid.

DONE IN OPEN COURT this 6th day of September, 1994.

[Michael R. McVey
Judge of the Superior Court

APPROVED AS TO FORM ONLY:

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Attorneys for Plaintiff

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	Chapter 11
ELAINE KAPSIMALIS,	Case No. 91-4780-PHX-GBN
Debtor.	Contested Matter "A"
GREAT WESTERN BANK,	ORDER
Movant, vs.	
ELAINE KAPSIMALIS,	
Respondent.	

Pursuant to the Stipulation between Elaine Kapsimalis, (hereinafter "Debtor"), Great Western Bank (hereinafter "Movant"), and Commercial Credit Corporation (hereinafter "Secured Creditor) filed with the Court, and good cause appearing,

IT IS HEREBY ORDERED AND REAFFIRMED, that all stays and injunctions, including the automatic stays under U.S. Bankruptcy Code §362(a), are hereby vacated and annulled with respect to the real property which is the subject of the Deed of trust recorded June 2, 1988 at Recorder's No. 88-266885 in the records of the Maricopa County, Arizona Recorder's Office, wherein Debtor has an interest and Movant is the beneficiary; and

IT IS FURTHER ORDERED, that Debtor shall make a Ten Thousand Dollar ($10,000) payment to be applied to the

arrearages owed to Movant. Such payment shall be made by 5:00 p.m. on April 21, 1993, by making payment to Movant's legal counsel, Bosco & DiMatteo, P.C., 3101 N. Central Avenue, Suite 700, Phoenix, AZ 85012.

IT IS FURTHER ORDERED, that commencing May 1, 1993, regular monthly installment payments shall resume and be paid by Debtor to Movant. Such monthly installments are to be Three Thousand Seven Hundred Forty-six Dollars and Eight Cents ($3,346.08). The $600 payment shall be applied each month to the arrearages owed by Debtor. In the event that payments are not received by Movant within fifteen (15) days of each monthly due date, Movant shall be entitled without further notice to conduct the Trustee's Sale it has scheduled and has been continuing from time to time with respect to the Deed of Trust hereinabove described.

IT IS FURTHER ORDERED that the balance of the arrearages owed by Debtor to Movant shall be paid by April 1, 1994. The calculations of all the arrearages need to be determined using the adjustable rate under the terms of the subject Promissory Note; and that the terms of the Promissory Note secured by the Deed of Trust hereinabove described have not been modified in any way.

IT IS FURTHER ORDERED that Secured Creditor's claim in these proceedings shall be modified and reduced as described in that certain Plan of Reorganization filed in this case on October 13, 1992, in conjunction with the filing of the Debtor's Disclosure Statement. The terms of the aforesaid Plan of Reorganization that relate to the claim of Secured Creditor shall be included in an amended plan of reorganization to be filed by Debtor within twenty days of the entry of this Order. Those terms are:

"Class 3 (Commercial Credit) Impaired. The claim of Commercial Credit arises out of a second trust deed on Debtor's residence. Debtor reaffirms this debt under the terms of the deed

of trust (and promissory note evidencing the indebtedness), but only as modified as described herein. The balance owed under the note and trust deed shall be reduced to the sum of $15,000, and interest shall accrue at the fixed rate of 7% per annum on that sum from the Effective Date of the Plan until the modified note and trust deed is paid in full. Payments of $350 per month will be made on the modified claim beginning on the fifteenth day of the month following the Effective Date of the Plan. No other sums shall be owed to Commercial Credit or its successors in interest, except as may accrue after the Effective Date of the Plan by reason of default occurring under the terms of the note and trust deed as modified hereunder. The holder of this claim shall retain its lien on Debtor's residence until the modified note is paid in full."

IT IS FURTHER ORDERED that the amended plan and disclosure statement to be filed by Debtor hereafter shall contain terms consistent with this Order and with the Stipulation described hereinabove; and that Movant and Secured Creditor shall vote to affirm any plan or amended plan of reorganization consistent with the terms of this Order and with the terms of the Stipulation.

IT IS FURTHER ORDERED that the parties to the Stipulation described hereinabove shall execute, sign and deliver to the appropriate person or company all documents necessary to carry out the terms of this Order and the terms of the Stipulation.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction as to the Secured Creditor's lien, and reaffirms that the stay, pursuant to § 362(a) of the U.S. Bankruptcy Code, has been annulled with respect to Movant's lien hereinabove described.

DATED: APR 26 1993

[GEORGE NIELSEN]
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re: ELAINE KAPSIMALIS, Debtor.	In Proceedings Under Chapter 11 Case No. 91-04780-PHX-GBN PLAN OF REORGANIZATION

[DOCUMENT IS INCOMPLETE - TYPED VERBATIM, AS PRESENTED TO THIS OFFICE, PAGES 1-8]

ELAINE KAPSIMALIS, Debtor herein, files the following Plan of Reorganization, pursuant to 11 U.S.C. § 1101 et. seq.

DEFINITIONS

The following terms, when used in this Plan of Reorganization, have the following meanings:

BANKRUPTCY CODE: The Bankruptcy Code as set forth in Title 11 of the United States Code.

BANKRUPTCY RULES: The Bankruptcy Rules and Local Bankruptcy Rules for the District of Arizona, to the extent applicable and not inconsistent with the Bankruptcy Code.

CONFIRMATION: The entry of an order of the United States Bankruptcy Court confirming the Plan.

DEBTOR: ELAINE KAPSIMALIS.

EFFECTIVE DATE OF THE PLAN: The date of the Confirmation Order becomes final within the meaning of the Bankruptcy Code and Bankruptcy Rules.

PLAN: The Plan of Reorganization in its present form or as it may be amended.

ARTICLE I.

Classification of Claims in Interest

The claims of all creditors now scheduled, or otherwise filed in this proceeding, shall be divided into the following Classes:

Class 1: All claims for administrative expenses of Debtor's Chapter 11 proceeding allowed pursuant to 11 U.S.C. § 503(b) and § 507.

Class 2: The claim of Great Western Bank (hereinafter "Great Western") arising out of a first trust deed on Debtor's residence.

Class 3: The claim of Commercial Credit arising out of a second trust deed on Debtor's residence.

Class 4: The claim of all general non-priority unsecured creditors.

ARTICLE II.

Treatment of Claims

Class 1 Unimpaired. The administrative expenses of Debtor's Chapter 11 proceeding allowed pursuant to 11 U.S.C. § 503(b) and § 507 shall be paid in cash, either from the assets of Debtor's estate or from Debtor's post-petition earnings upon the Effective Date, unless otherwise ordered by the Court, or upon such terms as may be agreed upon by the holder of any such allowed expense. These claims include the costs and expenses incurred in connection with the bankruptcy, including payments to professionals for compensation and reimbursement of expenses incurred in connection with services performed in this Chapter 11 case.

Administrative claims which are allowed after, but accrued prior to, the Effective Date of the Plan shall be paid in full, together with interest earned thereon from and after the Effective Date of the Plan, unless otherwise ordered by the Court, in cash, from Debtor's post-petition earnings or upon such terms as may be agreed upon by the holder of any such allowed expenses.

Allowed administrative claims which accrue after the Effective Date shall be paid by Debtor when due.

A. Secured Claims.

Class 2 (Great Western) Impaired. The claim of Great Western arises out of a first trust deed on Debtor's residence. Debtor reaffirms this debt under the terms of the trust deed (and promissory note evidencing the indebtedness). The previous order of the Court dated May 20, 1992, wherein the stays and injunctions, including the automatic stays imposed under U.S. Bankruptcy Code Section 362(a) have been annulled with respect to the real property which is the subject of the Deed of Trust of Great Western recorded June 2, 1988 under Recorder's No. 88-266885 in the records of the Maricopa County, Arizona Recorder's Office, is reaffirmed. The remaining arrearages owed to Great Western shall be paid as follows: 1) Commencing May 1, 1993, regular monthly installment payments shall resume and be paid by Debtor to Great Western. Such monthly installments are agreed to be Three Thousand Seven Hundred Forty-Six Dollars and Eight Cents ($3,746.08), plus Six Hundred Dollars ($600.00), for a total of Four Thousand Three Hundred Forty-six Dollars and Eight Cents ($4,346.08). The $600 payment shall be applied each month to the arrearages owed by Debtor. In the event that payments are not received by Great Western within fifteen (15) days of each monthly due date, Great Western shall be entitled without further notice to conduct the Trustee's Sale it has scheduled and has been continuing from time to time with respect to the Deed of Trust hereinabove described, and; 2) The balance of the arrearages owed by Debtor to Great Western shall be paid by April 1, 1994. the calculations of all the arrearages need to be determined using the adjustable rate under the terms of the subject Promissory Note. Pursuant to stipulation reached with Great Western it has been agreed that the terms of the Promissory Note secured by the Deed of Trust hereinabove described have not been modified in any way. The

holder of this claim shall retain its lien on Debtor's residence until the claim has been satisfied in full.

Class 3 (Commercial Credit) Impaired. The claim of Commercial Credit arises out of a second trust deed on Debtor's residence. Debtor reaffirms this debt under the terms of the deed of trust (and promissory note evidencing the indebtedness), but only as modified as described herein. The balance owed under the note and trust deed shall be reduced to the sum of $15,000, and interest shall accrue at the fixed rate of 7% per annum on that sum from the Effective Date of the Plan until the modified note and trust deed is paid in full. Payments of $350 per month will be made on the modified claim beginning on the fifteenth day of the month following the Effective Date of the Plan. No other sums shall be owed to Commercial Credit or its successors in interest, except as may accrue after the Effective Date of the Plan by reason of any default occurring under the terms of the note and trust deed as modified hereunder. The holder of this claim shall retain its lien on Debtor's residence until the modified note is paid in full.

B. Class 4 (General Unsecured Claims) Impaired.

Holders of allowed general unsecured non-priority claims shall receive no payments on their claims. This Class need not vote, as it is deemed to have rejected the Plan.

ARTICLE III.

Executory Contracts and Unexpired Leases

All executory contracts not specifically assumed or reaffirmed herein will be rejected and terminated. Any allowed claims arising therefrom will be included in Class 4.

ARTICLE IV.

Means for Execution of the Plan

Pursuant to this Plan, the Debtor shall make payments from her future earnings to fund the Plan or shall fund the Plan through the sale or lease of her residence.

ARTICLE V.

Modification of the Plan

The Debtor may propose amendments or modifications of this Plan at any time prior to confirmation, without leave of the Court, upon notice to the creditors. After confirmation the Debtor may, with approval of the Court, as long as it does not materially or adversely affect the interest of creditors, remedy a defect or omission, or reconcile any inconsistencies in the Plan, or in the Order of Confirmation, in such manner as may be necessary to carry out the purposes and effect of this Plan.

ARTICLE VI.

Retention of Property by Debtor

Upon confirmation, the Debtor shall be revested with her assets, subject only to the outstanding liens which may not be avoided under Title 11 of the United States Bankruptcy Code, including all exempt property. Debtor shall be entitled to manage her affairs without further Order of the Court.

ARTICLE VII.

Undelivered and Unclaimed Distribution

Any distributions of cash that are termed as undelivered or which cannot be delivered due to the lack of current address or otherwise will be retained by the Debtor in trust for the distributees; provided, however, that after the expiration of twelve months from the original payment date of such payment, such amount shall vest in the Debtor free and clear of any claims by the distributees.

ARTICLE VIII.

Payment Dates

Whenever any payment or distribution to be made under the Plan shall be due on a day other than a business day, such payment or distribution shall instead be made, without interest, on the next business day.

ARTICLE IX.
Provisions for Impaired Claims that Do Not Accept the Plan

In regard to any impaired classes of claims which do not accept the Plan by their requisite vote under 11 U.S.C. § 1126(c), the Court will be asked to confirm on the basis that the Plan does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under the Plan and which have not accepted the Plan, or on the basis that the Plan is entitled to confirmation under the requirements of 11 U.S.C. § 1129(a)(7)(A).

ARTICLE X.
Discharge of Claims

Upon confirmation of the Plan, all holders of the claims and Interests will be deemed to have released all Claims and Causes of Action against Debtor, whether known or unknown, other than as provided under the Plan, and Debtor will be released and discharged from all liabilities which are dischargeable under the Code. The discharge of Debtor shall be effective as to each claim, regardless of whether a proof of claim was filed, whether a claim is an allowed claim, or whether the holder thereof accepts the Plan.

ARTICLE XI.
Disputed Claims

Notwithstanding any other provisions of the Plan, no distribution shall be made to the holder of any disputed claim unless and until such disputed claim becomes an allowed claim. Debtor shall seek a determination within three months of the effective date of the Plan of the validity of any disputed claims.

Upon any such claim becoming an allowed claim, in whole or in part, such claim shall be entitled thereafter to a pro rata share of the distributions made to the unsecured creditors within Claimants Class. Further, such claimants shall be entitled to a pro rata share of any distributions that have already been made

under the Plan. In order to provide for such pro rata distribution, Debtor shall set aside the pro rata portion of the payments that are made to such class in a segregated interest-bearing account (the "Disputed Claims Escrow Account") in accordance with the amount of disputed claims that remain outstanding. In the event that any claim is determined to be an allowed claim, in whole or in part, then the claimant shall be paid in total satisfaction from the disputed claims escrow account claimant's pro rata share of the distributed payments. In the event that a claim is disallowed, in whole or in part, then such pro rata share shall be paid and distributed to such claimants or holders, if any, as would have been entitled to receive the same on a pro rata

. . .

[END OF DOCUMENT, AS SUBMITTED TO THIS OFFICE BY MR. TALAMANTE'S OFFICE].

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELAINE KAPSIMALIS, an unmarried woman, The Estate of ELAINE KAPSIMALIS,	1 CA-CV 94-0452A
	DEPARTMENT D
Debtor/Plaintiff-Appellant,	MARICOPA County Superior Court Cause No. CV 94-90943 and CV 94-09396 (Consolidated)
v.	
GREAT WESTERN BANK, a Federal Savings Bank,	
Defendant-Appellee.	ORDER

The Court, Presiding Judge William F. Garbarino and Judges Jefferson L. Lankford and James B. Sult participating, has considered appellee's motion for reconsideration.

IT IS ORDERED denying the motion for reconsideration.

Presiding Judge Garbarino would have requested a response to the motion.

DATED this 25th day of January, 1996.

Jefferson L. Lankford, Judge

SUPREME COURT
STATE OF ARIZONA

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-9396

April 24, 1996

RE: ELAINE KAPSIMALIS/ESTATE OF ELAINE KAPSIMALIS vs. GREAT WESTERN BANK
Supreme Court No. CV-96-0059-PR/A
Court of Appeals No. 1 CA-CV 94-0452A
Maricopa County No. CV 94-09396

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 23, 1996, in regard to the above-reference cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division One, Phoenix this 24th day of April, 1996.

NOEL K. DESSAINT, Clerk

TO:

David M. Talamante, Esq. and Julie Salazar, Esq., Dominguez & Talamante
Roger C. Decker, Esq. and Roger R. Foote, Esq., Kempton, Jarvis, Decker, Jenkins & Walker
Glen D. Clark, Clerk, Court of Appeals, Division One
West Publishing Company
Lexis-Nexis

U.S. CONST. art I, § 8, cl. 4:

The Congress shall have power . . . to establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

11 U.S.C. § 362(d):

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization,; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including

costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 704:

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

11 U.S.C. § 1123(a)(b)(d):

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation such as--

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash,

for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, if a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may--

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for--

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

. . .

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

11 U.S.C. § 1127:

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

11 U.S.C. § 1141:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not--

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if-

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The Court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

Ariz.Rev.Stat.Ann. Section 33-810(B)(1994):

A. On the date and at the time and place designated in the notice of sale, the trustee shall offer to sell the trust property at public auction for cash to the highest bidder. The attorney or agent for the trustee may conduct the sale and act at such sale as the auctioneer for the trustee. Any person, including the trustee or beneficiary, may bid at the sale. Only the beneficiary may make a credit bit, in lieu of cash, at such sale. The trustee shall require every bidder, except the beneficiary, to provide a one thousand dollar deposit, in a form satisfactory to the trustee, as a condition of entering a bid. Every bid shall be deemed an irrevocable offer until the sale is completed except that a

subsequent bid by the same bidder for a higher amount shall cancel that bidder's lower bid. To determine the highest price bid, the trustor or beneficiary present at the sale may recommend the manner in which the known lots, parcels or divisions of the trust property be sold. The trustee shall conditionally sell the trust property under each recommendation, and, in addition thereto, shall conditionally sell the trust property as a whole. The trustee shall determine which conditional sale or sales result in the highest total price bid for all of the trust property. The trustee shall return deposits to all but the bidder or bidders whose bid or bids result in the highest bid price. The sale shall not be deemed completed until the purchaser pays the price bid in a form satisfactory to the trustee.

B. The person conducting the sale may, for any cause deemed in the interest of the beneficiary or trustor, or both, postpone or continue the sale from time to time, or change the place of the sale to any other location authorized pursuant to this chapter by giving notice of the new date, time and place by public declaration at the time and place last appointed for the sale. Any new sale date shall be a fixed date within ninety calendar days from the date of the declaration. No other notice of the postponed, continued or relocated sale is required except as provided in subsection C of this section.

C. A sale shall not be complete if the sale as held is contrary to or in violation of any federal statute in effect because of an unknown or undisclosed bankruptcy. A sale so held shall be deemed to be continued to a date, time and place announced by the trustee at the sale and shall comply with subsection B of this section or if not announced, shall be continued to the same place and at the same time thirty days later, unless the thirtieth day falls on a Saturday or legal holiday, in which event it shall be continued to the first business day thereafter. In the event a sale is continued because of an unknown or undisclosed bankruptcy, the trustee shall notify, by registered or certified mail with

postage prepaid, all bidders who provide their names, addresses and telephone numbers in writing to the party conducting the sale, of the continuation of the sale.